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REVIEW OF FURTHER DEVELOPMENTS IN FIELDS WITH WHICH THE SUB-COMMISSION HAS BEEN CONCERNED

Study concerning the right to restitution, compensation and rehabilitation for victims of gross violations of human rights and fundamental freedoms

Second progress report submitted by Mr. Theo van Boven, Special Rapporteur

CONTENTS

	Paragraphs	Page
Introduction	1 - 4	1
I. REVIEW OF RECENT MATERIALS SUBMITTED TO THE UNITED NATIONS COMMISSION ON HUMAN RIGHTS AND RELEVANT TO THE PRESENT STUDY	5 - 18	2
A. Standard-setting activities and proposals thereto	6 - 8	2
B. Studies and particular issues of concern	9 - 11	3
C. Reports of rapporteurs and working groups pertaining to thematic or country-related issues	12 - 17	3
D. Comments	18	5

GE.92-12804/4733B

CONTENTS (continued)

		Paragraphs	Page
II.	COMPENSATION TO VICTIMS OF GROSS VIOLATIONS OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS RESULTING FROM THE UNLAWFUL INVASION AND OCCUPATION OF KUWAIT BY IRAQ	19 - 30	6
	A. The legal basis for Iraq's duty to pay compensation	21 - 23	6
	B. Loss, damage or injury suffered in connection with gross violations of human rights	24 - 27	7
	C. Governments and individuals as subjects submitting claims	28 - 29	9
	D. Some comments	30	9
III.	REPARATION IN THE CONTEXT OF THE REPORT OF THE COMMISSION OF INQUIRY SET UP TO EXAMINE THE OBSERVANCE BY ROMANIA OF THE DISCRIMINATION (EMPLOYMENT AND OCCUPATION) CONVENTION 1958 (No. 111)	31 - 43	11
	A. Forms of reparations	33 - 40	11
	B. Recommendations by the Commission of Inquiry	41 - 42	13
	C. Some comments	43	14
IV.	REPARATION UNDER THE EUROPEAN CONVENTION FOR THE PROTECTION OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS	44 - 50	15
V.	THE ISSUE OF IMPUNITY IN RELATION TO THE RIGHT TO REPARATION FOR VICTIMS OF GROSS VIOLATIONS OF HUMAN RIGHTS	51 - 55	18

Annex

Conclusions of the Maastricht Conference on the Right to Restitution, Compensation and Rehabilitation for Victims of Gross Violations of Human Rights and Fundamental Freedoms 21

Introduction

1. The Sub-Commission on Prevention of Discrimination and Protection of Minorities, at its forty-first session, by its resolution 1989/13, entrusted Mr. Theo van Boven with the task of undertaking a study concerning the right to restitution, compensation and rehabilitation for victims of gross violations of human rights and fundamental freedoms, taking into account relevant existing international human rights norms on compensation and relevant decisions and views of international human rights organs, with a view to exploring the possibility of developing some basic principles and guidelines in this respect. At the forty-second session of the Sub-Commission, the Special Rapporteur presented a preliminary report (E/CN.4/Sub.2/1990/10). He submitted a progress report (E/CN.4/Sub.2/1991/7) to the forty-third session of the Sub-Commission.

2. The Sub-Commission, at its forty-third session, by its resolution 1991/25, requested Mr. van Boven to continue his study and to submit to the Sub-Commission, at its forty-fourth session, a second progress report containing additional information on and an analysis of relevant decisions and views of international human rights organs, as well as information on and an analysis of national law and practice, and to submit to the Sub-Commission, at its forty-fifth session, a final report which should include a set of conclusions and recommendations. The Commission on Human Rights endorsed the request by the Sub-Commission by its decision 1992/108.

3. The present second progress report consists of five sections. The first section contains a review of materials submitted to the Commission on Human Rights at its forty-eighth session in so far as these materials are relevant to the present study. The second section deals with the issue of compensation to victims of gross violations of human rights and fundamental freedoms resulting from the unlawful invasion and occupation of Kuwait by Iraq. The third section
focuses on the report submitted to the Governing Body of the International Labour Office by the Commission of Inquiry to examine the complaint concerning the observance by Romania of the convention concerning Discrimination in respect of Employment and Occupation, 1958 (No. 111), with special reference to the chapter of the report on reparations. The fourth section deals with the issue of reparation under the European Convention for the Protection of Human Rights and Fundamental Freedoms. In the fifth section some views are expressed on the issue of impunity in relation to reparation for victims of gross violations of human rights. The present second progress report is meant to supplement the preliminary report and the first progress report.

4. An annex to this report contains the conclusions of the Maastricht Conference on the Right to Restitution, Compensation and Rehabilitation for Victims of Gross Violations of Human Rights and Fundamental Freedoms. This Conference was held from 11 to 14 March 1992, at the University of Limburg, Maastricht, Netherlands. The proceedings of the Conference will be published in a special issue of the Netherlands Quarterly of Human Rights. The conclusions of the Conference, as reproduced in the annex of the present report will provide a helpful basis for the Special Rapporteur to prepare the conclusions and recommendations for his final report which will include suggested principles and guidelines. The Special Rapporteur would welcome it if members of the Sub-Commission, in their comments on this second progress report, would also pay particular attention to the contents of the annex.

I. REVIEW OF RECENT MATERIALS SUBMITTED TO THE UNITED NATIONS COMMISSION ON HUMAN RIGHTS AND RELEVANT TO THE PRESENT STUDY

5. Recognition and realization of the right to reparation for victims of gross violations of human rights and fundamental freedoms should become an integral component of every endeavour which seeks to serve justice and the rule of law. In this regard it may be meaningful and illustrative to peruse the wide range of documentation and reports presented to the Commission on Human Rights at its forty-eighth session and to identify the relevance of the victim's perspective to the various areas of work of the Commission. These areas may be divided, for present purposes, into (a) standard-setting activities and proposals thereto, (b) studies and particular issues of concern, (c) reports of rapporteurs and working groups pertaining to thematic or country-related issues.

A. Standard-setting activities and proposals thereto

6. The draft declaration on the protection of all persons from enforced disappearance presented to the Commission by the Working Group on the Declaration on the basis of a draft text prepared by the Sub-Commission on Prevention of Discrimination and Protection of Minorities, contains two provisions of particular relevance to this study (E/CN.4/1992/19/Rev.1, annex). Article 5 states: "In addition to such criminal penalties as are applicable, enforced disappearances render their perpetrators and the State or State authorities which organize, acquiesce in or tolerate such disappearances liable at civil law, without prejudice to the international responsibility of the State concerned in accordance with the principles of international law". Furthermore, article 19 deals with the question of redress including compensation and rehabilitation: "The victims of acts of enforced disappearance and their families shall obtain redress and shall have the right to adequate compensation including the means for as complete a rehabilitation as possible. In the event of the death of the victim as a result of an act of enforced disappearance, their dependants shall also be entitled to compensation". The Commission adopted the draft declaration, by its resolution 1992/29 of 28 February 1992 and transmitted it through the Economic and Social Council, to the General Assembly for adoption.

7. In the draft which is being elaborated by a working group of the Commission with regard to a declaration on the right and responsibility of individuals, groups and organs of society to promote and protect universally recognized human rights and fundamental freedoms, a special chapter IV is envisaged for the right to protection and recourse to effective remedies in the event of violations of human rights. More in particular it is proposed in article 2 (c), of chapter IV, that everyone has in this connection the right to: "obtain a just decision and award providing redress, including any compensation due as well as enforcement of the decision and award, all without undue delay" (E/CN.4/1992/53, annex I).

8. In an analytical report of the Secretary-General on internally displaced persons the need for new standards is discussed. It is suggested that guidelines be drawn up concerning the human rights of the affected population which could be applied to all internally displaced persons regardless of the

cause of their displacement, the country concerned, or the legal, social, political or military situation prevailing therein. Among the issues which might be addressed are "principles concerning the duration of displacement, reparation and the right to return" (E/CN.4/1992/23, para. 104).

B. Studies and particular issues of concern

9. In his preliminary report on the means whereby the right of everyone to own property alone as well as in association with others fosters, strengthens and enhances the exercise of other human rights and fundamental freedoms, the Independent Expert appointed by the Commission outlines a series of basic conceptual issues. Among these he lists a number of limitations on the action of the State, notably "improper interference with and prohibition of seizure of property without compensation" and "just, equitable, reasonable and prior compensation in accordance with the law" (E/CN.4/1992/9, para. 56).

10. In a written statement on the issue of forced evictions, submitted by Habitat International Coalition, a non-governmental organization, reference is made to resolution 1991/12 adopted by the Sub-Commission on Prevention of Discrimination and Protection of Minorities concerning that subject matter. The written statement recalls that in the resolution emphasis is placed on the importance of the provision of compensation and for alternative accommodation, consistent with the wishes and needs of persons and communities forcibly or arbitrarily evicted, following negotiations with the affected persons or groups (E/CN.4/1992/NGO/2, para. 5).

11. In a written statement submitted by the Indian Council of South America on the quincentenary of the so-called "Encounter between two worlds", the text of a resolution signed by 19 indigenous organizations is reproduced. In that resolution the demand is expressed that "the Spanish Government, as well as the Governments of all Western colonial nations, assume the moral and political responsibility for reparations for the negative consequences of the invasion - the genocide, crimes, pillage of gold and silver - and pay indemnity to the descendants of the victimized peoples of the Americas in conformity with the international law" (E/CN.4/1992/NGO/17).

C. Reports of rapporteurs and working groups pertaining to thematic or country-related issues

12. The Ad Hoc Working Group of Experts on southern Africa mentions in its interim report to the Commission, in connection with a section of its report on bantustanization and forced population removals, that a three-year struggle of the Nkgonkgweni community against incorporation into Ciskei had finally won for the villagers the right to live in South Africa and to receive compensation of R 500,000 for homes which had been bulldozed in 1989 by the Ciskei Government (E/CN.4/1992/8, para. 172).

13. The Special Rapporteur appointed to examine questions relevant to torture reiterated a recommendation also included in previous reports: "Whenever a torture complaint is found to be justified, the victims should be provided with compensation without dalay (E/CN.4/1992/17, para. 294 (h)).

14. The Working Group on Enforced or Involuntary Disappearances reports that it had sent a letter to the Governments of Colombia, Guatemala, Peru and the Philippines containing a number of precise questions relating to measures which should be taken to implement the recommendations the Group had included in its mission reports after a visit by members of the Group to the countries concerned. The questions covered inter alia: (a) the reinforcement of national institutions dealing with the investigation of disappearances and with the protection of persons against disappearances; (b) measures taken to ensure accountability for cases of disappearance in which officials and law enforcement forces are involved; (c) measures taken to ensure that relatives of missing persons receive adequate compensation and are provided with financial assistance to carry out investigations into the whereabouts of their missing family members (E/CN.4/1992/18, para. 20). The Working Group also reports that it had decided to address to all States Members of the United Nations, as well as to non-governmental organizations concerned with disappearances, a letter requesting their comments or observations on the question of impunity as it affects the practice of enforced or involuntary disappearances (E/CN.4/1992/18, para. 22). It should also be noted that the Working Group in the report on the visit to Sri Lanka by three of its members included in its recommendations to the Government of Sri Lanka the following: "Acts found to involve grave violations of human rights such as disappearances, should not benefit from indemnity legislation" (E/CN.4/1992/18/Add.1, para. 204 (h)).

15. The Special Rapporteur on the situation of human rights in Kuwait under Iraqi occupation devoted in his conclusions and recommendations of his report a substantial and significant section to State and individual responsibility and compensation (E/CN.4/1992/26, paras. 249-261). With regard to compensation he refers to paragraph 18 of Security Council resolution 687 (1991) by which the Council decided to create a fund to pay compensation for claims resulting from Iraq's liability under international law for injury caused by the unlawful invasion and occupation of Kuwait. In the light of his analysis of the compensation issue the Special Rapporteur pleads in favour of a broad interpretation of the fund's coverage which should include compensation for material and non-material damage to victims of human rights violations and grave breaches of humanitarian norms, regardless of their nationality and their present status. The Special Rapporteur also argues, with reference to the previous progress report of the present study, that such broad interpretation would be in line with recent developments in international law, where the principle of compensation for victims of human rights violations is gradually gaining acceptance (E/CN.4/1992/26, para. 260). In view of the importance for present purposes of the creation of the compensation fund pursuant to Security Council Resolution 687 (1991), that matter will be discussed in more detail in section II of the present report.

16. The Special Rapporteur on summary or arbitrary executions discusses the rights of victims as part of the legal framework within which his mandate is implemented. He refers in this connection to the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, adopted by the General Assembly in its resolution 40/34. He considers of particular relevance principle 11 of the Declaration which states in part that victims should receive restitution from the State whose officials or agents were responsible for the harm inflicted. Taking into account that the report

submitted to the forty-eighth session of the Commission on Human Rights was the tenth report of the Special Rapporteur on the subject, it is troubling to note the final sentence of his brief section on the rights of victims. There he writes that, thus far, the number of cases in which the Special Rapporteur has received information concerning compensation to the families of persons executed summarily or arbitrarily is very small (E/CN.4/1992/30, para. 36).

17. The Special Representative on the human rights situation in the Islamic Republic of Iran reports on the compliance with the recommendations he made in the previous report he submitted to the Commission on Human Rights. One of the 15 recommendations was a request made to the Government that "compensation should be granted to persons affected by violations of human rights or to members of their families" (E/CN.4/1992/34, para. 454). The Special Representative reports that he was informed that the new penal law bill provides for moral and material compensation. However, he adds that no information is available as to when it will become law and enter into force, nor are its actual contents known as no copy of the bill has been received. Nor has any information been received concerning any specific case in which compensation has been paid to any person affected by human rights violations (E/CN.4/1992/34, para. 455).

D. Comments

18. The above review covers a wide range of materials and the information is illustrative rather than coherent. No firm conclusion can be drawn from this review. The materials have generally in common that they pertain to issues, practices and situations whch are characterized by what in United Nations vocabulary is phrased as "appearing to reveal a consistent pattern of gross and reliably attested violations of human rights". It is striking that, with the exception of the report relating to the situation of human rights in Kuwait under Iraqi occupation, only scarce or marginal attention is given to the issue of redress and reparation to the victims. This tentative finding is even more striking if one takes into account that other materials submitted to the Commission concerning similar issues, practices and situations are even less explicit or completely silent about doing justice to the victims. In spite of the existence of relevant international standards to that effect (see document E/CN.4/Sub.2/1990/10, paras. 9-22), the perspective of the victim is often overlooked. This perspective is perhaps considered a complication an inconvenience and a marginal phenomenon. A case should be made for demanding more systematic attention and action, at national and international levels in order to obtain redress and reparation for victims of gross violations of human rights. In the United Nations this demand may be reflected in standard-setting work, in studies, in reporting, in relief and redress procedures and in practical action such as designed by the Voluntary Fund for Victims of Torture (see report of the Secretary-General A/46/618).

II. COMPENSATION TO VICTIMS OF GROSS VIOLATIONS OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS RESULTING FROM THE UNLAWFUL INVASION AND OCCUPATION OF KUWAIT BY IRAQ

19. In resolution 687 (1991) adopted by the Security Council on 3 April 1991 the Council reaffirmed that Iraq "... is liable under international law for any direct loss, damage, including environmental damage and the depletion of natural resources, or injury to foreign Governments, nationals and corporations, as a result of Iraq's unlawful invasion and occupation of Kuwait" (para. 16). In this connection the Council decided to create a fund to pay claims that fall within paragraph 16 quoted above and to establish a Commission that will administer the fund. It should be noted that the Council's wording in paragraph 16 of resolution 687 (1991) by and large restates paragraph 8 of Security Council resolution 674 (1990), which reminded Iraq that "... under international law it is liable for any loss, damage or injury arising in regard to Kuwait and third States, and their nationals and corporations, as a result of the invasion and illegal occupation of Kuwait by Iraq".

20. For the purpose of the present study three issues will be discussed: (a) the legal basis for Iraq's duty to pay compensation; (b) loss, damage or injury suffered in connection with gross violations of human rights, (c) Governments and individuals as subjects submitting claims.

A. The legal basis for Iraq's duty to pay compensation

21. In the preliminary report of this study (E/CN.4/Sub.2/1990/10, paras. 33-36) the obligation to grant compensation under international law was briefly reviewed in the light of principles and rules of humanitarian law, norms of international human rights law and the law of state responsibility which is the subject of a comprehensive study of the International Law Commission. When the Security Council reaffirmed Iraq's liability under international law for any direct loss, damage or injury, the Council did not have in mind the loss, damage or injury which Iraq inflicted upon its own nationals as a result of large-scale practices of gross violations of human rights and which is the subject of a mandate entrusted to a Special Rapporteur pursuant to resolution 1991/74 of the Commission on Human Rights (E/CN.4/1992/31). The Security Council, basing itself on traditional concepts of international law and having primarily in mind the interests of reparation in the inter-State context, referred to loss, damage or injury caused by Iraq to foreign Governments, nationals and corporations. From this perspective it is quite natural and appropriate that the Special Rapporteur who studied the situation of human rights in Kuwait under Iraqi occupation, appointed pursuant to resolution 1991/67 of the Commission on Human Rights, paid due attention in his report to issues relating to responsibility and compensation (E/CN.4/1992/26, paras. 249-261).

22. It should be recalled, as did the Special Rapporteur on the situation of human rights in Kuwait under Iraqi occupation, that according to a well-established principle of international law, there is "an internationally wrongful act of a State when: (a) conduct consisting of an action or omission is attributable to the State under international law; and (b) that conduct constitutes a breach of an international obligation of the State" (art. 3 of

the International Law Commission's draft articles on State responsibility, Part One, doc. A/CN.4/SER.A/1975/Add.1). Furthermore, in the area of international humanitarian law, reference must be made to the common provision in the four Geneva Conventions of 1949 (art. 51 of the First Convention, art. 52 of the Second Convention, art. 131 of the Third Convention and art. 148 of the Fourth Convention) to the effect that no State shall be allowed to absolve itself or any other State of any liability incurred by itself or by another State with respect to grave breaches listed in the Geneva Conventions. "Grave breaches" are, according to the wording of article 147 of the Fourth Geneva Convention, "those involving any of the following acts, if committed against persons or property protected by the present Convention: wilful killing, torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health, unlawful deportation or transfer or unlawful confinement of a protected person, compelling a protected person to serve in the forces of a hostile Power, or wilfully depriving a protected person of the rights of fair and regular trial prescribed in the present Convention, taking of hostages and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly".

23. In addition, common article 3 of the Geneva Conventions which was included in the Geneva Conventions as a standard of protection in relation to armed conflicts not of an international character, must be considered as a minimum yardstick of customary international law applicable to all types of armed conflicts and thus relevant in the present legal context. Consequently, each State and any other entity involved in an armed conflict "shall be bound to apply, as a minimum, the following provisions: (1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria. To this end the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons: (a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture; (b) taking of hostages; (c) outrages upon personal dignity, in particular humiliating and degrading treatment; (d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples".

B. Loss, damage or injury suffered in connection with gross violations of human rights

24. One of the first tasks of the Governing Council of the United Nations Compensation Commission (UNCC), established pursuant to paragraph 18 of Security Council resolution 687 (1991) in order to administer the fund to pay compensation for claims, was the drawing up of criteria for the processing of urgent claims (S/AC.26/1991/1). These criteria were later supplemented in successive decisions taken by the Governing Council of the UNCC (S/AC.26/1991/2-7). According to the Commission's criteria, "claims must be

for death, personal injury or other direct loss to individuals as a result of Iraq's unlawful invasion and occupation of Kuwait. This will include any loss suffered as a result of:

(a) military operations or threat of military action by either side during the period 2 August 1990 to 2 March 1991;

(b) departure from or inability to leave Iraq or Kuwait (or a decision not to return) during that period;

(c) actions by officials, employees or agents of the Government of Iraq or its controlled entities during that period in connection with the invasion or occupation;

(d) the breakdown of civil order in Kuwait or Iraq during that period; or

(e) hostage-taking or other illegal detention" (S/AC.26/1991/1, para. 18).

25. In a decision taken by the Governing Council of UNCC during its second session, held on 18 October 1991, the Governing Council adopted formulations on the notions of serious personal injury and mental pain and anguish, for the purpose of the application of the criteria (S/AC.26/1991/3). With respect to serious personal injury the Governing Council decided that this notion "means:

(a) Dismemberment;

(b) Permanent or temporary significant disfigurement, such as substantial change in one's outward appearance;

(c) Permanent or temporary significant loss of use or limitation of use of a body organ, member, function or system;

(d) Any injury which, if left untreated, is unlikely to result in the full recovery of the injured body area, or is likely to prolong such full recovery".

26. "For purposes of recovery before the Compensation Commission, 'serious personal injury' also includes instances of physical or mental injury arising from sexual assault, torture, aggravated physical assault, hostage-taking or illegal detention for more than three days or being forced to hide for more than three days on account of a manifestly well-founded fear for one's life or of being taken hostage or illegally detained. 'Serious personal injury' does not include the following: bruises, simple strains and sprains, minor burns, cuts and wounds; or other irritations not requiring a course of medical treatment."

27. As regards mental pain and anguish, the following was stated: "Compensation will be provided for pecuniary losses (including losses of income and medical expenses) resulting from mental pain and anguish. In addition, compensation will be provided for non-pecuniary injuries resulting from such mental pain and anguish as follows:

(a) A spouse, child or parent of the individual suffered death;

(b) The individual suffered serious personal injury involving dismemberment, permanent or temporary significant disfigurement, or permanent or temporary significant loss of use or limitation of use of a body organ, member, function or system;

(c) The individual suffered a sexual assault or aggravated assault or torture."

C. Governments and individuals as subjects submitting claims

28. Initially, according to the criteria for the processing of urgent claims, the submission of claims was a right mainly reserved to Governments. As the criteria stated, "each Government will normally submit claims on behalf of its nationals; each Government may, in its discretion, also submit the claims of other persons resident in its territory" (S/AC.26/1991/1, para. 19). However, the Governing Council of the Compensation Fund "may request an appropriate person, authority or body to submit claims on behalf of persons who are not in a position to have their claims submitted by a Government". This solution was apparently not a satisfactory one and the Governing Council of the Compensation Fund felt the need to develop further guidelines on this point. In a decision taken during its second session on 18 October 1991, containing these further guidelines (S/AC.26/1991/5), the Governing Council stated that "a high number of individuals will most likely not be in a position to have their claims submitted by a Government. Among these individuals Palestinians represent the most numerous group. Furthermore, stateless persons and other individuals in the same position who still remain in Kuwait or who are situated on border lines are also to be included in this category".

29. Consequently, in order to meet the needs of those persons not represented by Governments and to fulfil their claims, the United Nations Compensation Commission considered it necessary that an appropriate person, authority or body be appointed to submit claims on behalf of those persons. Aware of the magnitude of the task to be entrusted to such person, authority or body, the latter should, according to the Governing Council of the Compensation Commission, seek advice and any appropriate cooperation from established and experienced international bodies, such as UNRWA, UNHCR and the ICRC.

D. Some comments

30. The arrangements made with regard to compensation to victims of gross violations of human rights and fundamental freedoms resulting from the unlawful invasion and occupation of Kuwait by Iraq, have a strong legal and political basis in a Security Council resolution and benefit from the authority of the Security Council. It is in the nature of the task and the mandate of the Security Council that the creation of the compensation fund and the criteria for the processing of claims are governed by State interests. The legal framework is set out in the law relating to state responsibility for injuries to aliens rather than in modern international human rights law. Nevertheless, significant trends and elements can be discerned as relevant in the overall context of the present study. For instance, the statement by the Governing Council of the UNCC that for purposes of recovery before the

Compensation Commission, the notion "serious personal injury" includes instances of physical or mental injury arising from sexual assault, torture, aggravated physical assault, hostage-taking or illegal occupation for more than three days, may provide helpful guidance in developing criteria concerning the right to reparation for victims of gross violations of human rights. The same applies to the scope and content given to "mental pain and anguish" and to the consequential pecuniary losses and non-pecuniary injuries resulting from such mental pain and anguish. Finally, in the light of the progressive development of international human rights law and the granting of locus standi to individuals before international fora, it is of eminent importance that injured persons may present their claims on their own behalf and do not have to rely on the good will of Governments. This is an a fortiori consideration and a pressing requirement of justice in the case of stateless persons and other individuals who have no Government to act on their behalf. This issue was brought out quite clearly in the practice of UNCC and one cannot but agree with the Special Rapporteur on the situation of human rights in Kuwait under Iraqi occupation, that compensation should be granted to victims of human rights violations regardless of their nationality and their present status in Kuwait (E/CN.4/1992/26, para. 261).

III. REPARATION IN THE CONTEXT OF THE REPORT OF THE COMMISSION OF INQUIRY SET UP TO EXAMINE THE OBSERVANCE BY ROMANIA OF THE DISCRIMINATION (EMPLOYMENT AND OCCUPATION) CONVENTION, 1958 (No. 111)

31. In its report submitted to the Governing Body of the International Labour Office at its two hundred and fiftieth session (May-June 1991), the Commission of Inquiry established in accordance with article 26, paragraph 4, of the Constitution of the International Labour Organisation (ILO) to examine the complaint concerning the observance by Romania of the Discrimination (Employment and Occupation) Convention, 1958 (No. 111), included a special chapter "Reparations" describing measures taken to remedy the consequences of human rights violations committed by the former regime in Romania and to redress the wrongs suffered. 1/ This report and especially the special chapter on reparations are very relevant to the present study and therefore deserve due attention.

32. Before entering into the question of reparations, it is appropriate to underline the obligations Governments undertake to comply with their treaty obligations, which may also amount to, as the case may be, the granting of redress and reparation. In this respect the Commission of Inquiry referred to the meaning and scope of the obligation stated in article 19, paragraph 5 (d) of the ILO Constitution, under the terms of which members ratifying a Convention "will take such action as may be necessary to make effective the provisions of such Convention". The Commission of Inquiry considered that legislation conforming to the requirements of Convention No. 111 should be fully and strictly enforced, which "implies the existence of effective administrative law enforcement services and, in particular, of measures enabling thorough inspection by officials who can act with complete independence. It also implies that the provisions of such legislation are brought to the attention of all persons concerned" and "that effective grievance procedures should guarantee the right to lodge complaints concerning infringements of the law, in conditions of independence and impartiality, without their having to fear reprisals of any kind". 2/ The Commission of Inquiry significantly added that where such "conditions are not fully complied with, a Government cannot disclaim responsibility for actions or omissions on the part of its agents, or for the behaviour of employers or even of private individuals". 3/

A. Forms of reparations

33. The Commission of Inquiry reviewed the various reparation measures taken by the Romanian Government in so far as those measures were designed to remedy the consequences of discriminatory practices in areas covered by the Discrimination (Employment and Occupation) Convention. These measures include: amnesties, establishment of ad hoc committees to settle cases of persons claiming to have been wronged, adoption of regulations designed to remove discriminatory measures, re-examination of certain verdicts, compensation granted by the tribunals.

34. The amnesty measures granted by Legislative Decree No. 3 of 4 January 1990, covered political offences under the previous regime, notably actions in connection with the expression of opposition to the

dictatorship and the personality cult, the terrorism and abuse of power committed by those who held political power. The amnesty measures also covered actions committed in connection with respect for human rights and fundamental freedoms, with the demand for civil and political, economic, social and cultural rights, and the abolition of discriminatory practices.

35. Another measure of reparation was the creation in February 1990 of a specialized committee "to inquire into abuses and violations of basic human rights and to rehabilitate the victims of the dictatorship". During the three months of its proceedings, the committee received over 18,000 claims for reparation of human rights violations committed by the previous Government. It examined and settled between 4,000 and 5,000 cases. The Commission of Inquiry reported that according to a witness, "it had been impossible for the Committee to conduct its proceedings efficiently, largely owing to lack of personnel and the inordinate number of cases". Reference was also made "to a certain lack of cooperation on the part of those whose duty it was to help solve the cases". 4/

36. A third reparation measure was the adoption on 30 March 1990 of a Legislative Decree to grant rights to persons persecuted for political reasons by the dictatorship established on 6 March 1945. The persons covered by this decree and entitled to benefit from its provisions, are employed or retired persons charged with political offences who have suffered from one of the following six circumstances:

- deprivation of liberty, pronounced on the basis of a final decision of the court or on the basis of a detention order for offences of a political nature;

- deprivation of liberty as a result of administrative measures or deprivation of liberty to serve the needs of an inquiry by the forces of repression;

- psychiatric internment;

- house arrest;

- forcible transfer from one place to another;

- first or second-degree disability arising during or following any of the above five situations, and preventing the person from finding work.

37. The reparations provided for under the Legislative Decree are of three kinds: the taking into account of the duration of the persecution or its consequences in the calculation of seniority in employment; financial indemnities proportionate to the duration of the persecution; and entitlements in respect of medical care and housing accommodation. The machinery set up for the implementation of the Legislative Decree comprises committees established at county level and composed of government officials and representatives of the parties concerned, including the Association of Former Political Detainees and Victims of the Dictatorship. A national committee is responsible for the coherence of the entire procedure. The Commission of

Inquiry reported that according to information received from the Romanian Government, in August 1990 around 9,300 reparations claims were registered, of which more than 5,400 had been settled. 5/

38. Other reparation measures pertained to the elimination of certain injustices in higher education, inherited from the period of the dictatorship. Students who had previously been excluded from higher education for political or religious reasons were reintegrated in their universities. Also teachers who had been persecuted for political or religious reasons were reinstated and enjoyed their full rights. However, the Commission of Inquiry was not able to gather detailed information concerning the number of students and teachers reinstated in their right to pursue an education, without discrimination on the basis of political opinion or of religion. 6/

39. The Commission of Inquiry also examined actions taken in favour of national minorities. In accordance with section 16 of Act No. 18 of 19 February 1991 concerning land ownership, "Romanian citizens belonging to the German minority, who were either deported or transferred and dispossessed of their lands by a prescription enacted after 1944" shall, if they so request, be awarded priority in the allocation of land or receive a number of shares proportionate to the value of land to which they are entitled.

40. Finally, the Commission of Inquiry examined a number of special cases brought to its notice. The Commission received detailed information "concerning the situation of the workers in Brasov, who, in November 1987, had demonstrated against the Government in power". The Brasov District Tribunal convicted, in December 1987, "61 workers for outrage to public decency and disturbance of the peace ('hooliganism')". The majority of those convicted were "forcibly transferred to other areas, to more arduous and lower-paid jobs. Furthermore, these workers declared that they were ill-treated during their arrest and detention" and they feared "they were irradiated during their detention after being exposed to radioactive substances". On 23 February 1990, the Supreme Court of Justice quashed the penal sentence of the Brasov District Tribunal and the convicted persons were consequently acquitted. However, these persons concerned felt that this decision was not sufficient to do justice to their case. Through the "Association of 15th November 1987" a request was made to the authorities to make good the financial losses the victims had suffered as a result of their conviction and transfer. In reply the Ministry of Labour awarded compensation to the victims on the basis of detailed calculations. 7/

B. Recommendations by the Commission of Inquiry

41. The Commission of Inquiry included in its report a series of recommendations which it listed in two categories: "essential premises" for the attainment of full compliance with the provisions of the Discrimination (Employment and Occupation) Convention, 1958 (No. 111), and measures to be taken on the basis of these premises. Among the essential premises such fundamental issues were mentioned as the strengthening of the rule of law; the separation of the legislative, executive and judiciary powers; independent judiciary; equal access to justice; constitutional guarantee of the rights recognized for all persons by the Universal Declaration of Human Rights and the International Covenants; freedom of association and the right to bargain

collectively; permanent structure for dialogue between management and trade unions; and - particularly relevant from the perspective of the present study - "that a competent body be entrusted with the task of receiving and settling some 14,000 complaints which remained pending after the dissolution of the Commission of the Provisional Council for National Unity to investigate abuses and infringements of fundamental human rights and to rehabilitate the victims of the dictatorship". 8/

42. The other category of recommendations included measures aiming at: putting an end to the effect of discriminatory measures in employment and restoring equal opportunity and treatment which was suspended or altered to the persons concerned; guaranteeing an efficient and impartial follow-up to the request for medical examinations made by the persons who went on strike on 15 November 1987 in Brasov and who have been rehabilitated by the courts; reinstating the workers who, under the Labour Code provisions on imprisonment for over two months, lost their jobs as a result of being arrested following the June 1990 demonstrations and of not being released until after more than two months, despite the absence of evidence; assisting citizens wishing to rebuild their houses destroyed as a result of the systematization policy declared by the previous regime; informing the supervisory bodies of the International Labour Organisation of the results achieved as regards reparations for the discrimination suffered by members of national minorities or by persons persecuted for political reasons. 9/

C. Some comments

43. The chapter on reparations of the report of the Commission of Inquiry is highly instructive and useful for the purposes of the present study. First, it emphasizes the importance of procedural requirements and conditions, such as notification of all persons concerned, existence of effective grievance procedures, and conditions of impartiality and independence. Second, it highlights and recommends a variety of means of redress and reparations (referred to in paras. 41 and 42 above) which are designed to fulfil the requirements of justice and to meet the special and various needs of the victims. Third, it brings out that the right to reparation should be insisted upon whenever systematic discrimination has been applied not only in the area of civil and political rights but also with respect to economic, social and cultural rights.

IV. REPARATION UNDER THE EUROPEAN CONVENTION FOR THE PROTECTION OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS

44. Under article 50 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, the European Court of Human Rights, when it finds that a violation of the Convention by a contracting State has taken place, may afford just satisfaction to the victim ("the injured party"), provided that the consequences of the violation cannot fully be repaired according to the internal law of the State concerned. In addition, in a more specific sense, article 5, paragraph 5, of the European Convention provides that everyone who has been the victim of arrest or detention in contravention of the provisions of the same article shall have an enforceable right to compensation.

45. The European Court has awarded "just satisfaction" (article 50 of the Convention) of a pecuniary nature in far over 100 cases. The amounts awarded vary largely and represent compensation for damage (pecuniary and non-pecuniary) and/or reimbursement of costs and expenses (in particular lawyers' fees). The Court has never been called on as yet to rule on a case involving "gross" violations of human rights and fundamental freedoms. Consequently, for the purpose of the present study no detailed analysis of the case law in connection with article 50 of the European Convention is called for. However, it may be useful to provide some indications as to the interpretation of article 50. In this respect, particular reference will be made to one of the early judgements of the European Court relating to the question of the application of article 50, viz. the judgement of 10 March 1972 in the De Wilde, Ooms and Versijp cases (the so-called "Vagrancy" Cases). 10/

46. In the "Vagrancy" Cases the Belgian Government argued that the applicants' request for just satisfaction was inadmissible because the applicants had not exhausted their domestic remedies in accordance with article 26 of the Convention. In the Government's view this article applied not only to the original application, in which a violation of the substantive provision of the Convention was alleged, but also to any claim for compensation under article 50. The Court did not accept the Government's plea of inadmissibility. The Court argued, inter alia, that article 50 had its origin in certain clauses which appeared in treaties of a classical type - such as article 10 of the German-Swiss Treaty on Arbitration and Conciliation, 1921, and article 32 of the Geneva General Act for the Pacific Settlement of International Disputes, 1928 - and had no connection with the rule of exhaustion of domestic remedies. Most significantly the Court added:

> "... if the victim, after exhausting in vain the domestic remedies before complaining at Strasbourg of a violation of his rights, were obliged to do so a second time before being able to obtain from the Court just satisfaction, the total length of the procedure instituted by the Convention would scarcely be in keeping with the idea of the effective protection of human rights. Such a requirement would lead to a situation incompatible with the aim and object of the Convention." 11/

It is apparent that the Court attaches great importance to the requirements of expeditiousness and effectiveness in matters concerning awards of just satisfaction.

47. As regards the merits of the same case, the Belgian Government argued that the internal law of Belgium enabled the national courts to order the State to make reparation for damage caused by an illegal situation for which it was responsible, whether that situation constituted a breach of rules of internal law or of rules of international law. The Court did not accept this view. The Court said that the treaties from which article 50 was borrowed had more particularly in view cases where the nature of the injury would make it possible to wipe out entirely the consequences of a violation but where the internal law of the State involved precluded that being done. The Court added:

> "Nevertheless, the provisions of Article 50 which recognize the Court's competence to grant to the injured party a just satisfaction also cover the case where the impossibility of restitutio in integrum follows from the very nature of the injury; indeed common sense suggests that this must be so a fortiori". 12/

48. In the same case the various requirements were reviewed for the affording of "just satisfaction" in application of article 50, namely that:

(i) the Court has found "a decision or measure taken" by an authority of a Contracting State to be "in conflict with the obligations arising from the ... Convention";

(ii) there is an "injured party";

(iii) the Court considers it "necessary" to afford just compensation. 13/

While the Court held that it had jurisdiction to award compensation, it declared in this case that the applicants' claims were not well-founded. In this connection it is evident that the wording of article 50 gives the Court a good deal of latitude as regards its competence whether to award compensation and to what amount. The Court said so itself when it observed:

> "as is borne out by the adjective 'just' and the phrase 'if necessary' the Court enjoys a certain discretion in the exercise of the power conferred by article 50". 14/

49. In conclusion, it may be observed that four basic conditions must be fulfilled to afford just satisfaction to the injured party under article 50 of the European Convention: (i) a breach by a State party of its obligations under the Convention; (ii) the absence of the possibility of a complete reparation (restitutio in integrum) on the part of that State party; (iii) the existence of material and/or moral damage; (iv) a causal link between the breach of the Convention and the existence of damage. 15/ In addition to these substantive conditions, particular weight should be given, as noted above, to the procedural requirements of expeditiousness and effectiveness.

50. In a number of cases Governments have also made payments, by way of compensation, as part of a friendly settlement reached in accordance with article 28 (b) of the European Convention for the Protection of Human Rights and Fundamental Freedoms. A special role in this regard is given to the European Commission of Human Rights which shall not only place itself at the

'disposal of the parties concerned with a view to securing the settlement but which should also see to it that, as article 28 (b) puts it, the settlement is achieved "on the basis of respect for Human Rights as defined in this Convention". In practice this requirement should imply that the settlement is not merely a trade-off between the parties but that the Government concerned will also redress the causes of the violations which may have occurred and take the necessary measures to prevent the re-occurrence of such violations. The European Commission of Human Rights, acting in the public interest for the defence of human rights, has in this regard an important supervisory duty to uphold the principles of the Convention. Any compensation or award granted to an injured party must not only be just towards that party itself but also do justice to the purposes and principles of the human rights protection system.

V. THE ISSUE OF IMPUNITY IN RELATION TO THE RIGHT TO REPARATION FOR VICTIMS OF GROSS VIOLATIONS OF HUMAN RIGHTS

51. Any study of questions relating to the right to restitution, compensation and rehabilitation for victims of gross violations of human rights and fundamental freedoms is bound to face the issue of impunity. This study will not analyse in depth the issue of impunity because a special working paper is being prepared on that subject (see decision 1991/110 of the Sub-Commission on Prevention of Discrimination and Protection of Minorities). However, for present purposes it cannot be ignored that a clear nexus exists between the impunity of perpetrators of gross violations of human rights and the failure to provide just and adequate reparation to the victims and their families or dependants.

52. In many situations where impunity has been sanctioned by the law or where de facto impunity prevails with regard to persons responsible for gross violations of human rights, the victims are effectively barred from seeking and receiving redress and reparation. In fact, once the State authorities fail to investigate the facts and to establish criminal responsibility, it becomes very difficult for victims or their relatives to carry on effective legal proceedings aimed at obtaining just and adequate reparation.

53. Legal bodies whose task it is to see to it that States parties to human rights treaties comply with their obligations under these human rights instruments, have set out a coherent and consistent line prescribing the measures that have to be taken to remedy violations of human rights. This coherent and consistent line of action includes investigating the facts, bringing to justice persons found to be responsible, and ensuring reparation to the victims (E/CN.4/Sub.2/1991/7, para. 20). In particular the Velásques Rodríguez case (E/CN.4/Sub.2/1991/7, paras. 28-33), a landmark decision of the Inter-American Court of Human Rights, confirmed the same coherent and consistent line. The Inter-American Commission on Human Rights heavily relied on this judgement when it concluded in the cases of eight petitioners that Uruguay's 1986 Amnesty law, the Ley de Caducidad, which grants impunity to officials who had violated human rights during the period of military rule, is in breach of articles 1, 8 and 25 of the American Convention on Human Rights.

54. The Inter-American Commission noted in its report, dated 4 October 1991, that the country concerned, by adopting and applying the Ley de Caducidad, had not undertaken any official investigation to establish the truth about past events. The Commission reiterated the Court's view in the Velásques Rodríguez case that a State's failure to investigate or to investigate in a serious manner with the consequence that the violation remained unpunished and the victim uncompensated, violated the State's undertaking to ensure the full and free exercise of the affected rights. The Inter-American Commission concluded by recommending to the Government that it pay the petitioners just compensation for their violated rights. 16/

55. It is also relevant to recall that the United Nations Working Group on Enforced or Involuntary Disappearances has taken a strong position against impunity. It stated that perhaps the single most important factor contributing to the phenomenon of disappearances was that of impunity. Perpetrators of

human rights violations, whether civilian or military, became all the more irresponsible if they were not held to account before a court of law. The Working Group further argued that impunity could also induce victims of those practices to resort to a form of self-help and take the law into their own hands, which in turn exacerbated the spiral of violence (E/CN.4/1990/13, paras. 18-24 and 344-347). It may therefore be concluded that in a social and political climate where impunity prevails, the right to reparation for victims of gross violations of human rights and fundamental freedoms is likely to become illusory. It is hard to perceive a system of justice that cares for the rights of victims and remains at the same time indifferent and inert towards gross misconduct of perpetrators.

Notes

1/ Report of the Commission of Inquiry, International Labour Office, Official Bulletin, Volume LXXIV, 1991, Series B, Supplement 3, paras. 471-506.

2/ Ibid., para. 576.

3/ Ibid., para. 578.

4/ Ibid., para. 476.

5/ Ibid., para. 496.

6/ Ibid., paras. 497-498.

7/ Ibid., paras. 500-506.

8/ Ibid., para. 616.

9/ Ibid., para. 617.

10/ European Court of Human Rights, De Wilde, Ooms and Versijp Cases ("Vagrancy" Cases), judgement of 10 March 1972 (Article 50), Series A, Vol. 14.

11/ Ibid., para. 16.

12/ Ibid., para. 20.

13/ Ibid., para. 21.

14/ Judgement of 6 November 1980 in the "Guzzardi" Case, Series A, vol. 39, para. 114.

15/ See also Jacques Velu and Rusen Ergec, La Convention Européenne des Droits de l'Homme, Bruxelles, 1990, paras. 1200-1207; P. van Dijk and G.J.H. van Hoof, Theory and Practice of the European Convention on Human Rights (second edition), Deventer-Boston, 1990, pp. 171-185.

16/ The report of the Inter-American Commission on Human Rights was not yet published at the time of the writing of the present report but it was extensively commented upon in The Law Group Docket, vol. 7, No. 1, Spring 1992, pp. 5 and 11, the International Human Rights Law Group, Washington, D.C.

Annex

Conclusions of the Maastricht Conference on the Right to Restitution, Compensation and Rehabilitation for Victims of Gross Violations of Human Rights and Fundamental Freedoms (Maastricht, Netherlands, 11-14 March 1992)

General

1. In these conclusions the term "reparation" refers to all types of redress, material and non-material, for victims of human rights violations. The terms "compensation", "restitution", and "rehabilitation" cover particular aspects of reparation.

2. The question of reparation has received insufficient attention and should be addressed by both the United Nations and other international organizations, as well as at the national level.

3. The question of reparation should be viewed in the overall context of the promotion and protection of human rights and fundamental freedoms and of the prevention of violations of such rights and freedoms.

4. Due regard should be paid to the experience gained in various countries that have passed through a period of gross human rights violations.

5. While all States are as a matter of principle duty bound to make reparation for gross human rights violations, different levels of development and particular circumstances should be taken into account when drawing up universally applicable guidelines.

Actors and levels of responsibility

6. As a matter of principle every State has the responsibility to redress human rights violations and to enable the victims to exercise their right to reparation. States must faithfully apply international, regional and national norms of human rights. Accordingly, every Government should set in place laws, institutions, policies and programmes intended to guard constantly against gross violations taking place.

7. The United Nations and other intergovernmental organizations at the global and regional level should support and assist a proper consideration and management of reparation at national levels.

8. Non-governmental organizations should, where necessary, insist on the recognition and implementation of the right to reparation of victims of gross violations of human rights, both at the international and national level, *inter alia* by exposing violations and assisting victims in pursuing their claims.

9. The United Nations, other intergovernmental organizations, States and non-governmental organizations should give increasing attention to ways and means of preventing and correcting abuses of human rights. When potential violators know they will have to account for their conduct, this may have a preventive effect.

Types of violations

10. While the violation of any human rights gives rise to a right of reparation on the part of the victim, for present purposes it is understood that the notion of gross violations of human rights and fundamental freedoms includes at least the following practices: genocide, slavery and slavery-like practices, summary or arbitrary executions, torture, disappearances, arbitrary and prolonged detention, and systematic discrimination.

11. Violations of other human rights, including violations of economic, social and cultural rights, may also be gross and systematic in scope and nature, and must consequently be given all due attention in connection with the right to reparation.

Victims

12. A basic tenet for approaching the issue of reparation are the needs and wishes of victims of gross violations of human rights and fundamental freedoms. All agencies and mechanisms dealing with human rights and humanitarian issues at national and international levels should be mindful of the perspective of victims, and of the fact that victims often suffer from long-term consequences of the wrongs inflicted on them.

13. For the purpose of determining the notion of victim, attention should be given to the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (General Assembly of the United Nations, resolution 40/34 of 29 November 1985), in particular the following phrases from paragraphs 1 and 2 of the Declaration:

> "'Victims' means persons who, individually or collectively, have suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights (....)"
>
> "The term 'victim' also includes, where appropriate, the immediate family or dependants of the direct victim and persons who have suffered harm in intervening to assist victims in distress or to prevent victimization".

14. In addition to individual means of reparation, adequate provision should also be made to entitle groups of victims or victimized communities to present collective claims for damages and to receive collective reparation accordingly.

Forms of reparation

15. Reparation is a means of repairing the past and setting norms for the future. In all cases reparation must be appropriate and just.

16. Compensation is a form of reparation which is to be paid in cash or to be provided in kind. The latter includes health and mental health care, employment, housing, education and land. In this respect compensation may involve, in appropriate situations and cases, a substantial reallocation of resources in order to meet by way of affirmative action, essential needs of persons and groups whose human rights have been grossly violated or neglected. Generally, this category includes those forms of compensation, the value of which may be expressed in monetary terms.

17. Non-monetary reparation serves the moral and social welfare of the victims and the causes of justice and peace. It includes the following important elements:

(a) the verification of the facts and the full and public disclosure of the truth;

(b) the public acknowledgment of responsibility for violations committed;

(c) the bringing to justice of persons found to be responsible;

(d) the protection of victims, their relatives and friends, and witnesses;

(e) the holding of commemorations and paying tribute to the victims;

(f) the establishment and the sponsoring of institutions for victim after-care and the training of personnel for helping the victims;

(g) the prevention of the recurrence of violations by such means as:

(i) putting closer control over security forces, in particular by bringing them under civilian command;

(ii) limiting the competences of military courts;

(iii) strengthening the independence of the judiciary;

(iv) protecting effectively the legal profession as well as human rights workers;

(v) improving detention registration systems;

(vi) providing human rights training to security forces and to law enforcement officers.

Standards

18. It is recommended that the United Nations give priority attention to drawing up a set of principles and guidelines that give content to the right to reparation of victims of gross violations of human rights.

19. It is further recommended that, where appropriate, new international instruments on human rights include provisions on reparation and that consideration be given to the amendment of existing instruments in this regard.

20. The proposal to prepare an international convention on redress for victims of gross violations of human rights deserves due consideration. The preparatory and drafting processes for such a convention can serve to focus the attention of Governments on these issues, promote exchanges of national experience and lead countries to develop adequate arrangements for anticipating, preventing, stopping and remedying gross violations of human rights.

Procedures and mechanisms

21. Every State owes it to the victims of gross violations of human rights to see to it that those responsible are brought to justice and that those who have suffered receive reparation. The legal system of every State should, therefore, deal with such issues in a just and effective manner. Even when the bringing to justice of the perpetrators is impossible, the State must continue the investigations and make all necessary efforts in finding and revealing the truth.

22. Every State should have in place permanent monitoring mechanisms to detect situations of potential gross violations of human rights, to provide early warning about them, to prevent them from occurring, and, in the unfortunate event of gross violations still taking place, to respond promptly to stop them and to see to it that reparation is given to the victims and justice is done to the perpetrators.

23. Verification of the facts can be credibly undertaken only by an independent body of recognized competence reporting publicly about its findings.

24. Procedures relating to the settlement of claims should be expeditious and effective, respect the needs of the victims and be in accordance with basic principles of fairness and justice.

25. The establishment of courts of human rights, or criminal courts, regionally or internationally, could help in the process of making those responsible for gross violations of human rights accountable for their acts, as could legislation authorizing universal jurisdiction over such violations.

26. Decisions relating to reparation for victims of gross violations of human rights should be implemented in a diligent and prompt manner. In this respect follow-up procedures should be devised at various levels, including the Government, the courts and/or special mechanisms.

27. Claims relating to reparation of gross violations of human rights should in principle not be subject to a statute of limitations. They should be dealt with expeditiously. Nobody may be coerced to waive claims for reparation.

28. The establishment of national and international centres or institutions for the promotion of justice for victims of gross violations of human rights would add a useful dimension to the protection of human rights. Such centres or institutions should establish and keep a permanent public record of the truth. Furthermore, they should gather and collect information, laws, studies and other materials on relevant national experiences, promote an exchange of experiences and comparisons, distill relevant lessons, and help to build up a stock of knowledge.